Filed 5/1/19 P. v. Corona CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARGARITO JUNIOR CORONA, Defendant and Appellant.	H044585 (Santa Clara County Super. Ct. No. F1452091)

Following a court trial, defendant Margarito Junior Corona was convicted of two counts of lewd or lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)).[1] As to each count, the trial court also found true the allegations that defendant had one prior strike/prior serious felony conviction for sentencing purposes. (§§ 667, subds. (a), (b)-(i), 1170.12, 667.61, subds. (a) & (d)). After dismissing the strike conviction, the trial court sentenced defendant to a term of 60 years to life. This term consisted of consecutive terms for the two 25 years to life offenses and the two five-year enhancements.[2] On appeal, defendant contends that the trial court erred when it admitted: (1) the victim's hearsay statement as a spontaneous statement; and (2) evidence that was not related to the charged offenses. We reject these contentions.

---

1 All further statutory references are to the Penal Code unless otherwise specified.

2 Though defendant's prior conviction was dismissed for "Three Strikes" purposes, it served as a one-strike under section 667.61, subdivisions (a) and (c)(8).

Defendant also contends, and the Attorney General concedes, that remand is appropriate to allow the trial court to exercise its discretion to strike the prior serious felony conviction for sentencing purposes. Accordingly, we reverse and remand for further proceedings.

I. Statement of Facts

On August 1, 2014, defendant and his girlfriend Connie went to the Goodwill store in Gilroy with Connie's four-year-old granddaughter, A.D. Defendant and A.D. went to the furniture section of the store, which was adjacent to the toy section. Connie did not join them. After defendant sat down on a couch, A.D. walked in front of him and then sat on his lap. While A.D. was facing defendant, he thrusted his pelvis against her several times. After A.D. got off of defendant, she pulled down her skirt.[3]

The following day, defendant, Connie, and A.D. returned to the Goodwill store. Defendant and A.D. went again to the furniture section where defendant sat on the couch. Defendant motioned to A.D. and she sat on his lap. As she was facing him, he pulled her to the side, kissed her, returned to a seated position, and thrust his pelvis against her several times. When A.D. got off of defendant, she twice wiped her mouth on the arm of the couch and with her hand. Defendant and A.D. walked to another area of the furniture section.

Miriam Nunez Romero, a Goodwill employee, was working in the toy section of the store when she saw defendant and A.D. walking in the furniture section. They stopped behind a desk. As defendant and A.D. were facing the same direction, defendant lifted her up from behind and began "humping" her. Though there was furniture between

---

[3] The store had a video surveillance system, which filmed defendant and A.D. in the furniture section. The camera began recording when movement was detected. However, if there was "very little movement," the cameras stopped recording. The videos were played for the trial court.

them, Nunez Romero had an unobstructed view of defendant and A.D. After defendant put A.D. down, they walked towards her. Nunez Romero took A.D.'s hand and told her that she was going to take her to her grandmother. A.D. was not crying.

As they were walking away, Nunez Romero told the manager what had happened. While she was talking to the manager, defendant "came and grabbed the girl again and rubbed her against his private parts." He also pointed his finger at Nunez Romero, but she could not hear what he said because A.D. began crying and yelling. The police were called and defendant left. When Nunez Romero took the girl to her grandmother and tried to tell her what had happened, the grandmother would not let her talk and tried to shut her up. Nunez Romero told the grandmother to wait for the police, but she left.

Officer Jesus Contreras arrived at the Goodwill store and eventually located the victim and her grandmother at a nearby bus stop. A.D. appeared very frightened and was crying. Officer Contreras spent about three to five minutes building rapport with them to find out what had happened. The grandmother told the officer that defendant "had done something but she did not see what it was." When the grandmother asked A.D. what had happened, she replied that defendant "tried to kiss her and touch her kitchen" and she "said no." The officer clarified with the grandmother that kitchen referred to her vagina.

A few days later, Officer John Ballard interviewed A.D. A.D. was extremely withdrawn, appeared afraid, and had tears in her eyes. As the officer tried to build rapport with her, A.D. said she was tired and wanted to leave. She eventually answered some questions. Officer Ballard told A.D. that someone had told him that defendant had touched her kitchen and he asked her if that had happened. She said yes. The officer showed her a drawing and she pointed to the vagina on the drawing when he asked her where her kitchen was. A.D. spoke softly, clung to her mother, and looked scared. She said that she was wearing underwear and a dress and that it happened by the toys. According to A.D., it happened one time.

On cross-examination, Officer Ballard testified that A.D. initially said that she had not been touched. After a "little cajoling" from the officer and her mother, A.D. said a girl touched her. A.D. consistently said that she wanted to go home, but her mother told her that she could not go home. It was only after her mother mentioned defendant's name and the officer referred to defendant that A.D. said that defendant touched her.

Deputy Alan Slaugh conducted a traffic stop of defendant's truck at approximately 4:07 p.m. When defendant exited the vehicle, the deputy noted that defendant's zipper was down and there was an open jar of Vaseline in the pocket of the open door.

Officer Michael McMahon searched defendant's truck, which was used to haul "scrap or junk." He found: a jar of petroleum jelly without a lid in the driver's side door panel; two other jars of petroleum jelly and a dildo in the center console; a sealed condom on the floor in front of the console; silicon bra inserts behind the driver's seat; and a red and white bikini top behind the passenger's seat. There was also a Kodak Instamatic camera, which had one photograph of A.D. and another of A.D. and her grandmother. There were many other items in the truck. There was trash around the dildo, including an old eating utensil, a used Styrofoam cup, and a can of chili. When the officer was searching defendant's truck, he was looking for evidence that might incriminate him in a prosecution of a sexual assault offense.

A.D. was seven years old when she testified. She was at the store with defendant and her grandmother. He touched her "private spots" with his hand in a way that made her sad. He did it once. He also tried to kiss her. She identified herself, her grandmother, and defendant in the surveillance video.

Officer Thomas Larkin interviewed defendant, whose date of birth is July 20, 1934. After waiving his *Miranda*[4] rights, defendant stated that he did nothing wrong. While he was on the couch, A.D. jumped on him and started kissing him. He

---

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

then said that he and A.D. were kissing each other and he had kissed her about four or five days previously. According to defendant, A.D.'s grandmother said that it was okay to kiss A.D. Defendant also said that A.D. was jumping on him while he was on the couch. Defendant denied that he touched A.D. on her vaginal area.

After Officer Larkin told defendant that A.D. and a witness said that he had touched her vaginal area, defendant eventually said that they were playing "and my finger went to the side." When asked why he touched her vaginal area and was "dry humping her," defendant responded, "I don't know." He denied being sexually attracted to A.D. and stated that it was "the first time it ever happened," and agreed that it was not an accident. He also stated, "[W]e were just playing and it got out of hand" and "I didn't do it on purpose." Defendant stated that he had initially touched her vaginal area accidentally and that he continued to touch her because he was "curious." He asserted that A.D. was "okay" with him playing with her and "touch[ing] her on her vaginal area," but began crying when "the woman took her hand." Defendant was also curious about touching her from behind. He knew Connie would scold him and "would have got mad for a while" if she saw him touching A.D. Defendant agreed that it was not "okay with society – for an 80 year old man to touch a four year old girl on her vaginal area because he's curious." He was "attracted to her," but "ha[d]n't done this in 60 years." According to defendant, it happened two times at the Goodwill store. The first incident occurred five days earlier when he kissed her and the second incident occurred on the day of his arrest. He also stated that his "sex drive's over" and he did not know what made him do it.

Defendant testified in his own behalf. He went to the Goodwill store to buy a pair of pants, because the zipper was broken on his pants. He went to the back of the store with A.D. After he sat on the couch, A.D. jumped on him and said, "[L]et's do a horse riding." She was on his stomach, not "down in the penis." He kissed her "in a family way."

While they were playing, defendant became tired and wanted to go and get pants. A.D. had her legs "across my leg here and in my belly." He "went down and with [his] hands and under her legs and get away from her. She told me don't touch me there." He responded, "I'm not touching you there. I touch your legs, spreading your legs so I can get up 'cause it was too hot and my back not so good you know that." He did not touch her "in a sexual way" and said he was not "stupid." Defendant noted that the store was full of people.

Defendant left before the police arrived, because he thought the police would seize his truck. He hid behind the cemetery and waited for the police to arrive. When the police arrived 20 minutes later, he left and drove his truck to his home. He did not intend to touch A.D. on her vagina.

II. Discussion

A. Admissibility of A.D.'s Hearsay Statement

Defendant contends that the trial court erred when it admitted A.D.'s hearsay statement to Officer Contreras as a spontaneous statement pursuant to Evidence Code section 1240.

1. Background

When Officer Contreras was dispatched to a report of an assault at the Goodwill store, he learned that A.D. and her grandmother had already left. About 10 to 15 minutes after receiving the dispatch call, Officer Contreras found them sitting at a bus stop 100 to 150 yards away from the store. At that time, A.D., who was sitting on her grandmother's lap, was "[v]ery frightened and crying." When asked if he remembered anything else about A.D.'s demeanor, Officer Contreras replied, "[I]f [my] memory serves me right she was scared that her grandma was going to jail for some reason." His observations were made about 20 minutes after the event had occurred. When the prosecutor asked if A.D. had made a statement, defense counsel objected on hearsay grounds. The trial court

found that the statement qualified as a spontaneous statement and overruled the objection. It allowed an answer subject to a motion to strike.

A.D. was initially uncooperative and it took Officer Contreras three to five minutes to "build a rapport, get them to tell me what happened." A.D.'s grandmother told the officer that defendant "had done something but she did not see what it was." At that point, A.D. said that defendant "tried to kiss her and touch her kitchen." A.D. told him "no." Defense counsel renewed her hearsay objection and argued that the statement were not close enough in time to the incident to qualify as spontaneous statements. The trial court overruled the objection.

2. Analysis

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

"For a statement to fall within this exception, ' "it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.] ' "When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But . . . '[n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made

under the stress of excitement and while the reflective powers were still in abeyance.'"' [Citation.]" (*People v. Penunuri* (2018) 5 Cal.5th 126, 152, italics omitted.)

The determination that a statement is admissible under the spontaneous statement exception is a factual question that must be supported by substantial evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) We review the trial court's determination under the abuse of discretion standard. (*Ibid.*)

Here, there was substantial evidence to support the trial court's determination that A.D.'s statement to Officer Contreras was admissible under the spontaneous statement exception. A.D., a very young child, made the statement shortly after defendant had touched her vaginal area and thrust his pelvis against her. When she made the statement, she appeared very frightened and was crying. Thus, the trial court did not abuse its discretion in concluding that A.D. was still in an unreflective state of stress as a result of defendant's conduct.

Defendant argues that there are several reasons why A.D.'s statement was not a spontaneous statement. First, he argues that there was no indication that she was under the emotional influence of defendant's conduct, because she was not upset when Nunez Romero took her hand to take her to her grandmother. However, Nunez Romero testified that A.D. became upset when defendant grabbed A.D. and demonstrated what he had previously done. At that point, A.D. was yelling so loudly that Nunez Romero could not hear what defendant was saying. Thus, there was sufficient evidence that A.D.'s emotional state was influenced by defendant's conduct.

Defendant next argues that Officer Contreras' presence caused her emotional excitement, because she was afraid her grandmother would be taken to jail. Given how upset A.D. became when defendant grabbed her a second time, the trial court could have reasonably concluded that A.D.'s emotional state was caused by both defendant's conduct and her fears for her grandmother.

Defendant also argues that A.D. did not make a spontaneous statement. He asserts A.D.'s statement was prompted by her grandmother's statement to Officer Contreras that defendant "had done something but she did not see what it was" and her question to A.D. asking "what had happened." He claims that these statements suggested the answer. We disagree. The statement and question were open-ended and did not suggest to four-year-old A.D. that defendant had committed an act of sexual molestation.

Even assuming that the trial court erred in admitting this evidence, defendant has failed to show prejudice. The evidence against defendant was overwhelming. The evidence of defendant's conduct as shown in the video, his admissions to Officer Larkin, his flight from the Goodwill store, and his unzipped pants when stopped by the police as well as the testimony of Nunez Romero and A.D. fully support the trial court's verdict that defendant engaged in lewd or lascivious acts with A.D. in the Goodwill store. Moreover, A.D.'s statement to Officer Contreras that defendant "tried" to touch her was less damaging than her trial testimony that he used his hand to touch her "private parts" and her use of a diagram that he touched her vagina.

Defendant argues, however, that the video is "ambiguous at best." The trial court did not agree. It found that "the conduct of the defendant as exhibited on the video recording that captures the events of August 2nd, 2014 is objectively speaking and on its face completely and overtly sexual in the Court's opinion. [¶] The Court notes in watching the video not only the nature of the defendant's actions in pressing and manipulating his genital area to the child and her genital area in the public setting, the nature of the kiss that is depicted on that video, and also the Court sees in the video the defendant manipulating his own genitals before and after those actions occurred. The Court then views the defendant grab the victim and press his genitals against her back side while standing in a back part of the store, which appears to be the activity that drew the attention of the store employee who ultimately took the child to the manager for intervention by law enforcement."

As to count two, the trial court also relied on the video recording. It stated: "When the Court looks at [(the defendant having the child on his lap and manipulating and moving his genitals against her genital area)] and considers the question whether this was some type of innocent activity such as playing a game of horse or horsey with the child and also considers the defendant's statements in the subsequent interview where he described conduct of his on or about those days as playing that, quote, got out of hand, the Court does not believe that it is reasonable to conclude that the defendant's conduct was something other than a criminal violation of Penal Code Section 288 subsection (a) on or about August 1st, 2014." The trial court also stated that defendant "motion[ed] to the child to come to him by a hand gesture at the beginning of the video recordings. It is some amount of time before the child finds her way on to the defendant's lap, but the Court believes that the evidence supports an inference that it was the defendant who was seeking to have the child on his lap and not simply the child who was coming to him on her open volition or of her own intention." The trial court further stated that defendant "paused or stopped what appeared to be overtly sexual actions when the customer was closer to the defendant and the child and also at a time when it could be more obviously seen." Having reviewed the video, we also reject defendant's characterization of it.

Defendant next argues that the video does not support Nunez Romero's testimony that she saw him turn A.D. around and "abuse" her. That the video does not show defendant " 'turning [A.D.] around' " might be explained by the limitations of the surveillance system, which was triggered by significant motion. In any event, the video does support her testimony to the extent that it shows defendant picking up A.D. from behind and thrusting his pelvis against her back side.

Defendant tries to lessen the impact of his admissions to Officer Larkin. He claims that the officer used coercive tactics to extract his admissions. However, we note that defendant is not arguing that his statements were involuntary or that they were not admissible. Defendant also points out that Officer Larkin was referring to the conduct at

the back of the store while defendant was talking about his conduct on the couch, which "clearly confused" him during the interview. Though the officer and defendant were initially referring to different locations in the store, defendant declined the officer's offer to play the video for him and never expressed any confusion before he made his damaging admissions.

In sum, defendant's attempts to characterize the evidence against him as weak are unpersuasive. Here, it is not reasonably probable that the result would have been more favorable to defendant absent the admission of A.D.'s statements to Officer Contreras. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

B. Admissibility of Items Found in Defendant's Truck

Defendant next contends that the trial court erred when it admitted into evidence the objects that were found in his truck.

1. Background

Defendant brought an in limine motion to exclude several items that had been found in his truck shortly after he left the Goodwill store. The items included: three jars of petroleum jelly, a condom, a Kodak camera, a dildo, a photo of female, a silicon bra, and a bikini. Defendant argued that the items were irrelevant and highly prejudicial. The prosecutor brought an in limine motion to admit the items. She argued that the items were relevant to show that he had an active sexual drive at the age of 80 and were probative of his lewd intent when he touched A.D.

At the hearing on the motion, defense counsel argued that the items were legal to possess unless there was a nexus between the items and the charged offenses. She further argued that the items were not probative but were highly inflammatory. The prosecutor pointed out that the items were found in defendant's truck 10 minutes after he fled from the Goodwill store and that the victim had twice been in the truck. Though she conceded

that she could not show that A.D. was aware that the items existed, she argued the items were relevant to show sexual intent.

Following argument, the trial court stated: "The Court does believe that the items found in the defendant's truck are sufficiently probative to be introduced into evidence at the trial, and that the probative value is not substantially outweighed by any of the considerations of Evidence Code section 352. [¶] The Court believes that the circumstances surrounding the defendant's contact with law enforcement just approximately ten minutes after the acts alleged to have occurred in Count No. 1[,] the things that he had in his truck, if they are to be brought into evidence in the way described by the parties in their written paperwork at a time when the zipper to the defendant's pants was down, he had just been in contact with the child under the circumstances that led to the charging of the offenses in this case, and he had a camera in his car that had only two pictures, and those pictures were of the alleged victim in the case, and the other items, because of their nature, the Court believes that the Court can give these items the weight that they deserve in the totality of the evidence that is presented, and that they are sufficiently probative to be introduced. And the Court has balanced the concerns of Evidence Code section 352."

After the evidence was introduced at trial, defense counsel renewed her objection. The trial court overruled the objection.

2. Analysis

Defendant contends that the exclusion of the evidence was required, because none of the items were relevant to a determination of whether defendant touched a young girl for the purpose of sexual gratification. He points out that the items were related to adults and were mixed in with the general refuse in the cab of the truck.

"'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) However, "[t]he court in its discretion may exclude evidence if its

probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) For purposes of analysis under Evidence Code section 352, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) We will not disturb the trial court's exercise of its discretion unless it was made "'in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Powell* (2018) 6 Cal.5th 136, 162.)

Here, the evidence had some relevance since it was probative of defendant's sexual intent at the time of one of the charged offenses. Shortly after he left the Goodwill store, defendant was found with an open container of petroleum jelly with his zipper down. The remaining sexual paraphernalia was found in the cab, rather than the bed, of the truck, and thus accessible to defendant and not junk that he had collected. The evidence was not unduly prejudicial. None of the items were contraband or so unique as to evoke an emotional bias against defendant.

Assuming the trial court abused its discretion in admitting the evidence, defendant has failed to establish prejudice. As previously discussed, the evidence against defendant was overwhelming. We also note that the trial court discussed the evidence in detail in reaching its verdict. But it did not mention any of the items found in the truck as material to its decision. Accordingly, it is not reasonably probable that the result would have been more favorable to defendant absent the admission of this evidence. (*Watson, supra,* 46 Cal.2d at p. 836.)

C. Prior Serious Felony Conviction

In supplemental briefing, defendant contends that the case must be remanded to permit the trial court to exercise its discretion to strike his prior serious felony conviction for sentencing purposes.

In December 2016, the trial court found true the allegations that defendant had suffered a prior serious felony conviction and imposed two consecutive five-year terms under section 667, subdivision (a), which was statutorily required when defendant was sentenced. (Former § 667, subd. (a).) "On September 30, 2018, the Governor signed Senate Bill [No.] 1393 which, effective January 1, 2019, amend[ed] sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Under *In re Estrada* (1965) 63 Cal.2d 740, "[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) "The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses. [Citations.]" (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Since nothing in Senate Bill No. 1393 suggests a legislative intent that the amendments to sections 667, subdivision (a), and 1385, subdivision (b), apply prospectively only, "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393 becomes effective on January 1, 2019. [Citations.]" (*Garcia*, *supra*, 28 Cal.App.5th at p. 973.) Here, defendant's case was not final on January 1, 2019. (See *People v. Vieira* (2005) 35

Cal.4th 264, 306 [“‘a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citations.]’”])

“‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.]’” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) When the record shows that the trial court proceeded with sentencing on the assumption that it lacked discretion, remand for resentencing is necessary “unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*Ibid.*)

Here, there is no indication in the record that the trial court would have declined to strike his prior serious felony conviction under section 667, subdivision (a). The Attorney General concedes that since defendant’s case was not final on January 1, 2019, remand is appropriate.

III. Disposition

The judgment is reversed and the matter is remanded for resentencing to allow the trial court to exercise its discretion pursuant to section 1385 to strike defendant’s serious felony conviction for the purposes of sentencing him under section 667, subdivision (a).

_____
Mihara, J.

WE CONCUR:

_____
Greenwood, P. J.

_____
Elia, J.

People v. Corona
H044585